IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

In Re: ALWIN E. HOPFMANN, GREGORY HESSION, CLARENCE PERKINS, CLARENCE PAULIN and BETH SULLIVAN,

Petitioners

PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS AND/OR INJUNCTION TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

APPENDIX

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MEMORANDUM AND ORDER ON REQUEST FOR THE CONVENING OF A THREE JUDGE COURT, in the United States District Court for the District of Massachusetts, Alwin E. Hopfmann, et al., Plaintiffs v. Michael Joseph Connolly, Secretary of State, et al., Civil Action No. 82-1530-MC, dated June 22, 1982, signed by the Honorable John J. McNaught.

This matter came on for a hearing on a motion for a stay. The plaintiff Alwyn (sic) E. Hopfmann and three registered voters filed suit against officers of the Commonwealth of Massachusetts and the Democratic State Committee, challenging the validity of the Massachusetts State Democratic Committee charter and its

"15% rule". The plaintiffs request the convening of a three-judge court, alleging their right to such court under 42 U.S.C. § 1973c and 28 U.S.C. § 2284.

Similar actions have been begun by other persons in the courts of the Commonwealth of Massachusetts, and in open court on June 21, 1982, the parties advised me that issue has been joined and the matter formerly before Mr. Justice Liacos has now gone to the full bench. It appears that the issue may well be decided by the Surpeme Judicial Court and that an order may be entered by the full bench with an opinion to follow. The parties reported to me that there is no reason to believe that the Supreme Judicial Court will delay in making its decision.

After hearing, I have decided to grant a stay of this action, but have re-

quired that responsive pleadings be filed in the usual course. The stay is to expire upon the issuance of an order by the Supreme Judicial Court.

The defendants in the action before me have filed a motion to dismiss in the nature of a motion based upon a failure to file a claim upon which relief may be granted. F.R.Civ.P. 12(b)(6).

A dispute has arisen as to whether I, as a single judge, am empowered to hear and decide on a motion to dismiss under these circumstances. Upon consideration, I am of the opinion that if such a motion is to be granted, it must be granted by a court of three judges and not by the single judge who initiates the three-judge proceedings. See Svejkovsky v. Honorable Edward A. Tamm, 326, F.2d 657 (D.C. Cir. 1963).

Accordingly, I intend to request the convening of a three-judge panel to hear and determine the motion to dismiss, in the event that the ruling which eventually will be made by the Supreme Judicial Court of the Commonwealth of Massachusetts is not dispositive of the entire problem.

/S/ John J. McNaught
United States District Judge

MEMORANDUM AND ORDER DENYING PRELIMINARY INJUNCTION in a special three-judge court formed pursuant to 42 USC § 1973c and 28 USC § 2284, Alwin E. Hopfmann, et al., Plaintiffs v. Michael Joseph Connolly, Secretary of State, et al., Defendants. Civil Action No. 82-1530-MC. Dated July 7, 1982.

This action came on to be heard on plaintiffs' request for a preliminary injunction and motions to dismiss by the defendants.

After argument and deliberation, the court cannot say at this juncture of the proceedings that there is a reasonable likelihood of success of the merits of the request for declaratory judgment. Specifically, the absence of a sufficient likelihood of success as to the issues of (1) whether the Commonwealth of

Massachusetts is a "covered jurisdiction" under the Voting Rights Act and (2) whether the complaint is defective in its failure to contain a good-faith allegation of racially discriminatory intent or impact requires a denial of the injunction.

July 7, 1982

/s/ Frank M. Coffin,
Chief Judge U.S. Court
of Appeals for the
First Circuit

/s/ Walter J. Skinner,
United States District
Judge

/s/ John J. McNaught
United States District
Judge

MEMORANDUM AND ORDER issued by the Honorable John J. McNaught as a single court judge below, Alwin E. Hopfmann, et al., Plaintiffs, v. Michael Joseph Connolly, Secretary of State, et al., Defendants. Civil Action No. 82-1530-MC, dated July 7, 1982.

As a single judge, I adopt the reasons set forth by the members of the three-judge court for the denial of the preliminary injunctive relief requested by the plaintiffs under the Voting Rights Act. As a single judge, furthermore, I am unable to find that there is a reasonable prospect of success on the merits insofar as plaintiffs' complaint is bottomed upon allegations of a violation of rights of plaintiffs under the First and Fourteenth Amendments of the Constitution of the

United States, or upon Articles VIII and IX of the Constitution of the Commonwealth of Massachusetts in its Declaration of Rights, or upon the theory of constitutional equitable estoppel. It is my opinion also that the plaintiff Hopfmann has not demonstrated a reasonable prospect of success on his cause of action resting upon Title 42 § 1983.

Preliminary injunctive relief denied.

The motions to dismiss on the theories of liability within the province of the single judge are under advisement as of this date.

/s/ John J. McNaught
United States District Judge

DENIAL OF PRELIMINARY STAY ISSUED BY MR. JUSTICE BRENNAN OF THIS COURT in a letter dated July 9, 1982 from the Office of the Clerk, Supreme Court of the United States, Alexander L. Stevas, Clerk, by Katherine Downs, Assistant Clerk In Re Alwin E. Hopfmann, etc., et al. v. Michael Joseph Connolly, etc., et al. A-18.

Your application for a stay in the above-entitled case has been presented to Justice Brennan, who has endorsed thereupon the following:

"Denied

Wm. J. Brennan, Jr.

7/8/82"

DENIAL OF PRELIMINARY STAY ISSUED BY MR. JUSTICE REHNQUIST OF THIS COURT in a letter dated July 9, 1982 from the Office of the Clerk, Supreme Court of the United States, Alexander L. Stevas, Clerk, by Katherine Downs, Assistant Clerk In Re Alwin E. Hopfmann, etc., et al. v. Michael Joseph Connolly, etc., et al. A-18.

Pursuant to your request of July 9, 1982, your application for a stay in the above-entitled case has been presented to Justice Rehnquist, who has endorsed the following on your request:

"7/9/82

Denied

WHR"

App. F-1

OPINION OF THE JUSTICES TO THE GOVERNOR, Supreme Judicial Court of Massachusetts. April 23, 1982. 385 Mass. 1201.

A question was propounded by the Governor of the Commonwealth of Massachusetts to the Justices of the Supreme Judicial Court with respect to the nomination of party candidates for placement on the state primary ballot. The Justices of the Supreme Judicial Court, gave answer that proposed mandatory statute providing that "Notwithstanding the charter, rule or by-law of a political party, any candidate, who is enrolled in such political party, submitting nomination papers subject to the provisions of this chapter shall be a candidate for nomination of the state primary" would abridge the constitutional rights of the party and its members to

associate while allowing candidates to be placed on the state primary ballot in contravention of the party's charter.

Question answered.

On April 23, 1982, the Justices submitted the following answers to questions propounded to them by the Governor.

To His Excellency, the Governor of the Commonwealth of Massachusetts:

The Justices of the Supreme Judicial Court respectfully respond to the questions set forth in the Governor's request dated April 5, 1982, and transmitted to the Justices on April 6, 1982.

General Laws c. 53, § 44, as amended through St. 1981, c. 278, § 1, provides in part that "(t)he nomination of candidates for nomination at State primaries shall be by nomination papers." There is pending before the Governor for his approval

House Bill No. 5852, which would amend c.53, § 44, by inserting after the first sentence the following sentence: "Notwithstanding the charter, rule or by-law of a political party, any candidate, who is enrolled in such political party, submitting nomination papers subject to the provisions of this chapter shall be a candidate for nomination at the state primary." Article Six, Section III, of the charter of the Democratic party of the Commonwealth of Massachusetts, provides "There shall be a State Convention in even-numbered years for the purpose of endorsing candidates for statewide offices in those years in which such office is to be filled. Endorsements for statewide office of enrolled Democrats nominated at the Convention shall be by majority vote of the delegates present and voting, with the

proviso that any nominee who receives at least 15 percent of the Convention vote on any ballot for a particular office may challenge the Convention endorsement in a State Primary Election."

Stating his uncertainty "as to the necessity or constitutionality of H.5852 if enacted into law," the Governor requests, pursuant to the authority contained in Pt. II, c.3, art. 2, of the Massachusetts Constitution, as amended by art. 85 of the Articles of Amendment, the opinion of this court on the following questions of law:

> "1. Does the fifteen percent rule in the Democratic Charter supersede the current provisions of General Law, Chapter 53, Section 44, or can a candidate be placed on the Democratic State Primary Ballot by nomination papers without having received fifteen percent of

the vote at the party convention?

"2. Would enactment of H.5852 allow a candidate to be placed on the Democratic State Primary Ballot by nomination papers without having received fifteen percent of the vote at the party convention?"

The constitutional provision which empowers us to answer questions propounded by the Governor, the Council, and the Legislature, restricts our authority to "important questions of law" and to "solemn occasions." Part II, c. 1, § 1, art. 2 of the Massachusetts Constitution. To preserve the principle of separation of powers, fundamental in our system of government, we are bound strictly to observe these constitutional limitations. Answer of the Justices, 362 Mass. 914, 916-917, 291 N.E. 2d 598 (1973). As the Justices have ad-

vised, "By a solemn occasion the Constitution means some serious and unusual exigency. It has been held to be such an exigency when the Governor or either branch of the Legislature having some action in view has serious doubt as to their power and authority to take such action, under the Constitution, or under existing statutes." Answer of the Justices, 373 Mass. 867, 871, 366 N.E. 2d 730 (1977), quoting from Answer of the Justices, 148 Mass. 623,625-626, 21 N.E. 439 (1889).

(1) Because question number 1 inquires only about the legal effect of the current statute in light of the Democratic party charter, and not about the Governor's authority to take action, there is no solemn occasion authorizing us to answer. Opinion of the Justices, ___ Mass. ___, ___ _ ___, Mass.Adv. Sh.

(1981) 1361, 1381-1382, 424 N.E. 2d 1092. It may well be that the Justices' answer to question number 1 would help the Governor determine the "necessity" of House No. 5852 in view of the present statute, a concern expressed in the request. However, whether the bill is necessary raises the question whether it is wise or expedient for the Governor to approve the bill. The Justices are not empowered to answer questions bearing on the wisdom or expediency of proposed legislation. Answer of the Justices, 319 Mass. 731, 734, 66 N.E. 2d 358 (1946). Opinion of the Justices, 314 Mass 767, 771-772, 49 N.E. 2d 252 (1943). Not having the authority to answer question number 1, we respectfully request that we be excused from answering it.

In the context of the Governor's expressed uncertainty as to the constitutionality of House No. 5852, we interpret question number 2 to inquire whether, if House No. 5852 were approved, G.L. c. 53, § 44, as thereby amended, would abridge the constitutional rights of the Democratic party and its members to associate by allowing candidates to be placed on the Democratic State primary ballot in contravention of the party's charter. The Governor has a present duty to act on House No. 5852. Part II, c. 1 § 1, art. 2, of the Massachusetts Constitution. This duty, and the Governor's expressed doubt about whether House No. 5852 would be constitutional if he approved it, present a solemn occasion requiring our answer to the second question. See Opinion of the Justices, 314 Mass. 767, 772, 49 N.E. 2d

252 (1943).

"The (Democratic Party of the Commonwealth) and its adherents enjoy a constitutionally protected right of political association. 'There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of "orderly group activity" protected by the First and Fourteenth Amendments ... . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom.' Kusper v. Pontikes, 414 U.S. 51, 56-57, 94 S.Ct. 303, 307, 38 L.Ed.2d 260 (1973). 'And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States.' Williams v.

Rhodes, 393 U.S. 23, 30-31, 89 S.Ct. 5, 10-11, 21 L.Ed. 2d 24 (1968). Moreover, '(a)ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.' Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S. Ct. 1203, 1211, 1 L.Ed.2d 1311 (1957); see NAACP v. Button, 371 U.S. 415, 431, 83 S. Ct. 328, 337, 9 L.Ed.2d 405 (1963)." Cousins v.Wigoda, 419 U.S. 477, 487-488, 95 S.Ct. 541, 547, 42 L.Ed.2d 595 (1975). "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." Democratic Party of U.S. v. Wisconsin, 450 U.S. 107, 122n22, 101 S.Ct. 1010, 1019, 67 L.Ed.2d 82 (1981), quoting L. Tribe, American Constitutional Law 791

(1978). A determination of who will appear on a general election ballot as the candidate endorsed by an identified political party is a critical decision for that party. The party, therefore, has a substantial interest, implicit in its freedom of association, to ensure that party members have an effective role in that decision. Democratic Party of U.S. v. Wisconsin, supra.

Within the Commonwealth, the winner by a plurality of a party primary becomes that party's candidate for statewide office in the general election. G.L. c 53, § 2. Voting in party primaries is limited to enrolled party members and unenrolled voters who enroll at the polls just before receiving ballots. G.L. c. 53, § 37. Apart from Article Six, Section III, of the State Democratic party charter, in order to be placed on a party's primary

ballot, a candidate for statewide office must be an enrolled member of that party, G.L. c. 53, § 48, and submit nominating papers signed by at least 10,000 registered voters, c. 53, § 44, who may be enrolled in that party or unenrolled. G.L. c. 53, § 46. Therefore, apart from Article Six, section III, of the State Democratic party charter, a candidate for statewide election could be placed on the Democratic party ballot and win the primary, thus becoming entitled to be placed on the general election ballot as the Democratic party candidate, with little or no support from the regular party membership. 1/

1/ As of February, 1980, 39.9% of all registered voters in the Commonwealth were unenrolled. Bachrach v. Secretary of the Commonwealth, ___ Mass. ___, ___, Mass.Adv.Sh.(1981) at 97 415 N.E.2d 832.

The State Democratic party charter, Article Six, Section III, proviso that any nominee who receives at least 15% of the vote at the State convention may challenge the convention endorsement, by negative implication adds to the statutory requirement of nomination papers for placement on the primary ballot the further requirement that a candidate must receive at least fifteen percent of the convention vote. This has the double effect of limiting the number of candidates on the primary ballot, thereby eliminating the confusion that may result from too many candidates, and of limiting the candidates to those with significant party support, thereby giving the party members an effective role in choosing the party's candidate in the general election. The State has been held to have a compelling

interest in limiting the number of candidates in order to prevent voter confusion. American Party of Texas v. White, 415 U.S. 767, 780-781, 94 S.Ct. 1296, 1305-06, 39 L.Ed.2d 744 (1974). Storer v. Brown, 415 U.S. 724, 732, 94 S.Ct. 1274, 1280, 39 L.Ed. 2d 714 (1974). A political party has a parallel interest.

If House No. 5852 were approved, G.L. c. 53, § 44, as thereby amended, would appear to override the charter requirement of 15% of the convention vote for placement on the primary ballot and, together with c. 53, § 46, would eliminate the Democratic party's control of who its candidate in the general election would be. This would substantially infringe the right of freedom of association of the Democratic party and its members, and therefore, to pass constitutional

muster, it must serve a compelling State interest, Sears v. Secretary of the Commonwealth, 369 Mass. 392, 397, 341 N.E. 2d 264 (1975), and do so with as little infringement on constitutional rights as possible. See Riddell v. National Democratic Party, 508 F.2d 770, 776-778 (5th Cir. 1975). We must apply "strict scrutiny" to its justification and operation. Bachrach v. Secretary of the Commonwealth, ___ Mass. ___, ___, Mass.Adv.Sh. (1981) 93, 101, 415 N.E.2d 832.

The Commonwealth unquestionably has a compelling interest in the overall regularity of the election process, including limitation of the number of candidates on the ballot so as to avoid voter confusion and ensuring that the candidates whose names appear on the ballot have significant community support.

American Party of Texas v. White, 415 U.S. 767, 782, 94 S.Ct. 1296, 1306, 39 L.Ed.2d 744 (1974). This applies to the conduct of primary elections, Kusper v. Pontikes, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973), Rosario v. Rockefeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d L (1973), which are an important part of the procedure by which the ultimate office holder is chosen. Sears v. Secretary of the Commonwealth, supra, 369 Mass. at 398, 341 N.E.2d 264. These interests are served by the requirement that each candidate for statewide office obtain the signatures of at least 10,000 registered voters on nomination papers, G.L. c. 53, § 44, but they are not served by the elimination of a 15% convention vote requirement for placement on the primary ballot. Elimination of the Democratic party charter

requirement could only increase the number of candidates on the primary ballot, with a resulting increased potential for voter confusion.

We assume that House No. 5852 was designed to promote the integrity of the election process. Nevertheless, the Commonwealth's compelling interest in the integrity of the election process does not constitutionally justify elimination of party control over who the party's candidate in the general election will be. This view finds support in Democratic Party of U.S. v. Wisconsin, supra. In that case, the United States Supreme Court struck down a State statute that compelled the party to seat delegates at its national convention who were bound by the statute to vote on the first ballot with the results of a primary election in which any

registered voter could participate regardless of party affiliation. This was contrary to the national party rules. Wisconsin impermissibly attempted to override the national party's attempt to limit "those who could participate in the processes leading to the selection of delegates to their National Convention." Id. 450 U.S. at 122, 101 S.Ct. at 1019. General Laws c. 53, § 44, as it would be amended by House No. 5852, would attempt to override the State Democratic party's effort to ensure that regular party members have a substantial voice in the selection of its candidates for statewide office, and that, at least in conjunction with §§ 44, 46, and 37 of G.L. c. 53, is impermissible. If the law of the Commonwealth were to require that nomination papers be signed only by regular members

of the party, contrary to c. 53, § 46, or that only regular members of the party may vote in the primary, contrary to c. 53, § 44, as it would be amended by House No. 5852, would be less intrusive on a political party's constitutional rights. However, we express no opinion on whether it would be sufficiently less intrusive to be constitutionally sound, since that is not the question before us, nor need we consider whether any proviso of the Constitution of the Commonwealth might prohibit the proposed enactment.

(2) We answer question number 2, as interpreted by us above, as follows: If House No. 5852 were approved, G.L. c. 53, § 44, as thereby amended, would abridge the constitutional rights of the Democratic party and its members to associate by allowing candidates to be placed on the

Democratic State primary ballot in contravention of the party's charter.

The foregoing opinion is submitted by the Chief Justice and the Associate Justices subscribing hereto on the 23rd day of April, 1982.

EDWARD F. HENNESSEY

HERBERT P. WILKINS

PAUL J. LIACOS

RUTH I. ABRAMS

JOSEPH R. NOLAN

NEIL L. LYNCH

FRANCIS P. O'CONNOR

ORDER OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, SJC-2889, dated July 6, 1982, Frederick C. Langone, et al. v. Secretary of the Commonwealth, et al.

On June 18, 1982, the Single Justice reserved and reported the following questions of law presented by this action:

1. Whether all candidates who have complied with applicable statutory requirements must appear upon the Democratic state primary ballots, notwithstanding the failure to obtain at least fifteen percent of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III of the 'Charter of the Democratic Party of the Commonwealth?

2. Whether the decision by the Secretary of the Commonwealth that he will not place upon the Democratic state primary ballots those candidates who failed to

obtain at least fifteen percent of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III of the 'Charter of the Democratic Party of the Commonwealth,' but otherwise complied with the statutory requirements to have their names placed upon the ballots violated the constitutional or statutory rights of the voters, the candidates, or their supporters?

Upon consideration of the argument and briefs of the parties, we interpret the State statutes in light of the State and Federal constitutions and rule that the Secretary of State must give effect to the relevant charter provisions. Accordingly, we answer the questions reported, "no."

A rescript will issue forthwith with an opinion or opinions to follow.

App. H-1

ARTICLE SIX, SECTION III, OF THE CHARTER OF THE MASSACHUSETTS DEMOCRATIC PARTY, adopted at Convention of May 21-22, 1982.

There shall be a State Convention in even-numbered years for the purpose of endorsing candidates for statewide offices in those years in which such office is to be filled. Endorsements for statewide office of enrolled Democrats nominated at the Convention shall be by majority vote of the delegates present and voting, with the proviso that any nominee who receives at least 15 percent of the Convention vote on any ballot for a particular office may challenge the Convention endorsement in a State Primary Election.

HOUSE BILL NO. 5852 of the State Legislature of the Commonwealth of Massachusetts (1982).

An Act ensuring that candidates nominated by nomination papers shall have access to the state primary ballot.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 44 of Chapter 53 of the General Laws, as amended by Chapter 136 of the Acts of 1977, is hereby further amended by adding after the first sentence the following sentence: -- Notwithstanding any party charter, rule or by-law, any candidate submitting nomination papers pursuant to this chapter shall be a candidate for nomination at the state primary.

App. J-1

RECEIPT FOR NOMINATION PAPERS issued to Alwin E. Hopfmann, petitioner herein, by the Office of the Massachusetts Secretary of State.

Date: 5-28-82 Party: Democratic

Candidate's Name: Alwin E. Hopfmann

Office: Senator in Congress

District: Comm of Mass

Signatures Needed: 10,000

Certified Signatures Filed: 10,798

Candidate's Statement: None

Ballot Status:

...

Not yet on ballot: Reason: Democratic Charter (box checked)

...

Checklist: (two checked)

Written Acceptance (checked)

Enrollment Certificate (checked)

(Illegible)

App. J-2

Filed by: Alwin E. Hopfmann

Daytime Phone: 422-6351

Rec'd By: (Illegible)

Residential Address: 29 Tuttle Rd.
Sterling, Mass 01564

N.B.: Underscoring indicates hand-written information entered onto form.

App. K-1

LETTER OF MARCIA MOLAY, DIRECTOR OF ELECTIONS to Alwin E. Hopfmann, petitioner herein, dated May 28, 1982 denying placement of his name on the Democratic state primary ballot.

For the reasons given in the enclosed statement, Secretary Connolly has decided to follow the April 23 Supreme Judicial Court Opinion of the Justices, 385 Mass. 1201 (1982). Because the enclosed letter from the Democratic State Committee does not indicate your compliance with the party charter, we are unable to place your name on the Democratic state primary ballot.

We have already issued to you our receipt reflecting this decision. Please contact this office if you have any questions about this decision.

App. L-1

LETTER OF JULY 6, 1982 FROM JAMES F. SCHOENER, OF THE FIRM OF MILLER, CANFIELD, PADDOCK AND STONE, COUNSEL OF RECORD BELOW TO DAVID R. HUNTER, VOTING SECTION, CIVIL RIGHTS DIVISION, UNITED STATES DEPARTMENT OF JUSTICE. Case No. 82-1530-MC.

On behalf of our clients, Alwin E. Hopfmann, Gregory Hession, Clarence Perkins, Clarence Paulin and Beth Sullivan, plaintiffs in an action in the United States District Court for the District of Massachusetts, Case No. 82-1530-MC against Michael Joseph Connolly, Secretary of the Commonwealth of Massachusetts, Francis X. Bellotti, Attorney General of the Commonwealth of Massachusetts, Chester G. Atkins, Chairman of the Democratic State Committee of Massachusetts, and the Democratic State Committee of Massachusetts, involving a

Voting Rights Act of 1965 violation, we wish to register our strenuous objection to the submission under Section 5 made by the Democratic Party of the Commonwealth of Massachusetts ("Submission").

The proposed change in the ballot access law of the Commonwealth of Massachusetts adds the further qualification that a candidate receive an endorsement by 15% of the delegates at a Democratic "endorsing convention" in order to be placed on the Democratic primary ballot ("15% Rule") to the present strict requirement of nominating petitions duly signed by 10,000 voters either enrolled in the Democratic party of the Commonwealth of Massachusetts or unenrolled. Our objection to the submission is based on the variety of problems raised by the submission that have significant detrimental

implications for minority voters generally, as well as our clients (one of whom is a member of a minority group).

1. The impact of the 14% Rule will fall far more heavily upon minority candidates who usually have geographically circumscribed constituencies. Their initial support base may well be sufficient to allow them to meet the nominating petition requirements but insufficient for them to conduct a state-wide pre-primary campaign in 321 various Democratic caucus jurisdictions.
2. The 15% Rule lengthens the primary campaign time period backwards prior to and into the Democratic caucus period and requires candidates to obtain support in

many geographically spread caucus jurisdictions. Moreover, most of the 321 caucus jurisdictions are without significant minority activity, effectively foreclosing the ability of minority candidates with geographically circumscribed support to even place their name on the ballot.

3. The 15% Rule will tip the balance of political power even more in favor of incumbent office holders who have state-wide contacts and who can safely ignore a geographically concentrated minority community.

4. Historically, party endorsement conventions have been used to discriminate against minority

participation in party activities. There is no showing that the Massachusetts Democratic 15% Rule will not or does not have the effect or the potential effect for such discrimination.

5. A significant avenue of minority participation in Massachusetts politics will be foreclosed by the 15% Rule because the requirements for independent candidacy are so much more burdensome than the requirements for primary ballot access, i.e., 60,000 signatures for ballot access as opposed to the present requirement of 10,000 signatures on a nomination petition to obtain access to the primary ballot.

6. The assertion that the Voting Rights Act of 1965 "merely" applies due to census differences is irrelevant and apparently an attempt to obtain a "back door bail-out" from the strictures of the Voting Rights Act. The implication that the Voting Rights Act ought not to apply or be involved (because of the "mere" technical application of the Voting Rights Act) ignores the record of school and community discrimination that has continued for many years in the Boston metropolitan area against minorities and, more importantly, the command of the legislation itself and its judicial interpretation.

7. The Democratic Party and the Secretary of State have already applied the 15% Rule and denied candidates, including Alwin E. Hopfmann, the right to ballot access although they have met the requirements of state law. This denial occurred before any preclearance of the 15% Rule was sought. The deprivation resulting from the unprecleared 15% Rule should not be applied retroactively to unfairly deprive otherwise qualified candidates of ballot access.

8. The 15% Rule seriously impinges fundamental rights to be a candidate under the Massachusetts Constitution and the United States Constitution.

If you have any questions or comments concerning these problems, or desire further elucidation of them, please do not hesitate to contact me.

SUBMISSION UNDER SECTION 5 OF THE VOTING RIGHTS ACT under 42 U.S.C. § 1973c and 28 C.F.R. § 51 as amended by 46 Fed. Reg. 870 (1981) on behalf of the Democratic Party of the Commonwealth of Massachusetts. Undated.

In compliance with the procedures for the administration of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c (1981) and the preclearance requirements established thereunder.[1] the Democratic State Committee of the Commonwealth of Massachusetts on November 17, 1979. This submission is offered on behalf of the Democratic Party with respect to the covered jurisdictions of Amherst, Ayer, Belchertown, Bourne, Harvard, Sandwich, Shirley, Sunderland and Wrentham pursuant

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1/ 28 C.F.R. § 51, as revised by 46.

to 28 C.F.R. §§ 51.7, 51.21(b).

The towns in question have been singled out because the Director of the Bureau of the Census has determined that fewer than 50% of the persons of voting age residing in said towns voted in the 1968 presidential election.2/ As such, the Voting Rights Act mandates that, commencing November 1, 1968, the aforementioned towns must obtain preclearance before any election law changes affecting said covered jurisdictions can be implemented. It is the position of the Democratic State Committee, as it is of the Attorney General of Massachusetts, that the Voting Rights Act applies to these towns because the standards applied by the federal census takers differ from those of the state

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2/ Fed. Reg. 870 (1981).
30 Fed. Reg. 16913 (1974).

census takers, and not because of any discriminatory voting practices.

Accordingly, the Democratic Party of the Commonwealth of Massachusetts with respect to the named towns seeks that preclearance by this submission.

DESCRIPTION OF THE CHANGE AFFECTING VOTING

The Democratic Party of the Commonwealth of Massachusetts seeks preclearance of Article Six, Section III of the Charter of the Democratic Party (see Appendix A) which provides:

> 'There shall be a State Convention in even-numbered years for the purpose of endorsing candidates for statewide offices in those years in which such office is to be filled. Endorsements for statewide office of enrolled Democratis nominated at the Convention shall be by majority vote of the delegates present and voting, with the proviso that any nominee who receives

at least 15 percent of the Convention vote on any ballot for a particular office may challenge the Convention endorsement in a State Primary Election.

The practice with regard to placing names on primary ballots in effect prior to the adoption of Article Six, Section III (the 15 Percent Rule") is set forth by statute 3/and applies to all political parties. Under this statutory requirement, "the nomination of candidates for nomination at state primaries shall be by nomination papers" 4/ signed by a minimum of either 5,000 or 10,000 voters, depending on the office sought. Although the statute remains in effect and sets forth the minimum number of

3/ Mass. Ann.Laws ch.53, § 44 (Law Co-op. 1978).

4/ Id.

signatures which any party candidate must file to be included on the primary ballot, the implementation of the 15 Percent Rule would prevent the inclusion on the primary ballot of any candidate who did not receive at least 15 percent of the votes of convention delegates present and voting on any one convention ballot.

The Charter of the Democratic Party, including the 15 Percent Rule, was adopted in 1979 by a Charter Convention composed of delegates selected by local party caucuses on the basis of "one Democrat, one vote." The Charter was drafted by a Charter Commission which was mandated by the Party's 1977 issues convention and composed of 25 members selected by then Democratic State Committee Chairman Charles Flaherty. The Commission, which included

2 minority group members 5/ held seven public hearings across the Commonwealth before drafting the charter. A dominant theme which ran through the testimony heard by the Commission was a desire by the party members to strengthen the Democratic Party. With this theme in mind, the Commission drafted a charter designed to reestablish party influence over endorsements for nominations. By limiting nominations to those endorsed by convention and significant challengers (thereby making nomination to the primary ballot more valuable) and strengthening party discipline,

5/ In 1970, Negro and other races comprised 3.6% of the state's population. General Social and Economic Characteristics: Massachusetts, Bureau of the Census, Table 45 (April, 1972). By the 1980 census, Blacks comprised 3.9% of the population; American Indians, 0.1%; Asians and Pacific Islanders, 0.9%; and others 1.7%. Race of the Population by States; 1980 Bureau of the Census, Table 2, (July 1981).

the Commission hoped to attract non-partisan voters and to increase participation in the political process.

The Commission's draft of the Charter was circulated among local committees for criticism and adopted at two sessions of the Charter Convention held in 1979. Article Six was voted on at the November 17, 1979 session and was adopted by the required two-thirds vote, 560 to 270. Prior to the vote, Section III was amended to reduce the challenge requirement from 20 percent to 15% of an endorsing convention vote.

The 1982 Democratic Endorsing Convention was held on May 21-22 and consisted of 3300 delegates elected by 100,000 participants at caucuses open to any registered Democrat. An amendment was presented to the Convention to delete the 15 Percent

Rule from the Charter but was defeated on a roll-call of 1,698 to 468. A second amendment to postpone the effective date of the 15 Percent Rule was then proposed and defeated on a voice vote.

The 15 Percent Rule was examined recently in an advisory opinion 6/ issued by the Justices of the Massachusetts Supreme Judicial Court at the request of the Governor of the Commonwealth. In that opinion, the Justices held that the rule promulgated by the Democratic Party was within the party's constitutionally-protected right of political association and that proposed legislation which would circumvent the rule would abridge that right.

6/ Opinion of the Justices, 385 Mass. 1201 (1982). (See Appendix B).

There is no anticipated adverse effect on members of minority groups as a result of the enforcement of the 15 Percent Rule. In drafting the Charter with the aim of strengthening the Party, the Commission sought to make the Party a more effective voice in the political process. Some commentators have argued that participation in the political parties has enabled minorities to increase their influence and to gain greater control over their destinies 7/ and that the weakening of parties has led to reduced participation by minorities. 8/ By making the convention endorsement meaningful and thereby reducing the need to mount an

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7/ Dobel & Stockton, Unreforming the Parties, Commonsense, Summer, 1979, at 25. (See App. c).

8/ Id. at 27.

expensive statewide campaign, the Party anticipates that the change will benefit candidates, especially those with limited campaign resources.

While the 15 Percent Rule should have the collateral result of increasing minority group participation in the Democratic Party, the Charter expresses this goal directly in Article Seven, Affirmative Action and Outreach. (See Appendix A). This article of the Charter states the Party's support for affirmative action programs, identifies the Party's affirmative action and outreach goals, establishes a sub-committee to formulate plans for affirmative action throughout the Party and sets forth steps to implement those plans. Through this commitment, the Party anticipates even greater minority group involvement.

The 15 Percent Rule has not yet been enforced in an election but the Secretary of the Commonwealth of Massachusetts has indicated his intention to apply the rule with regard to the primary to be held on September 14, 1982 by refusing to accept nomination papers from candidates who did not receive at least 15% of the vote on any ballot at the convention held on May 21-22, 1982. In preparation for that primary, the Secretary has stated that he must make a determination of candidates to be included on the ballot by July 9, 1982 in order to have the ballots printed in time for the primary. The 15 Percent Rule is at present an issue in three pending actions: Langone v. Connolly, Docket No. 82-214-Civil in the Supreme Judicial Court of Massachusetts; Hopfmann v. Connolly, Case No. 82-1530-MC in the

United States District Court, District of Massachusetts; Pressman v. Connolly, Case No. 82-1431-C in the United States District Court, District of Massachusetts.

According to the Office of the Attorney General of the Commonwealth of Massachusetts, that office has no record that the prior practice for nomination to state primaries as mandated by statute 9/ has been precleared. At the time the preclearance requirement of the Voting Rights Act became effective with regard to the nine Massachusetts towns, the pertinent statute provided that nomination to state primaries was by nomination papers or endorsement by a state convention. 10/ With the repeal of the statutory provisions for

9/ Mass. Ann. Laws ch. 53 § 44 (Law Co-op. 1978).

10/ Mass. Ann. Laws ch. 53, § 44 (Michie/Law Co-op. 1964).

conventions in 1973, the statute was amended to remove the alternative method of qualification for the ballot by endorsement by convention. 11/ It is the position of the Democratic State Committee that if these changes are to be considered changes affecting voting under Section 5 of the Voting Rights Act either the individual covered jurisdictions or the state on their behalf were responsible for making submissions for preclearance. 12/

Due to the July 9, 1982 deadline for preparation of ballots for the primary election and the pending litigation involving the 15 Percent Rule, the Democratic State Committee requests that this submission be given expedited consideration.

12/ 28 C.F.R. § 51.25(o).

Without expedited consideration, the Massachusetts electoral process would suffer substantial disruption.

App. N-1

CONSTITUTIONAL AND STATUTORY PROVISIONS:

A. CONSTITUTIONAL PROVISIONS

1. Article I, Section 4, Clause 1:

> "The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of Chusing Senators."

2. Amendment XVII, Clauses 1 and 2:

> "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years ... . When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies; Provided, That the legislature of any State may empower the executive thereof to make tempo-

rary appointments until the people fill the vacancies by election as the legislature may direct."

3. Article I, Section 5, Clause 1:

"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, ..."

4. Article IV, Section 2, Clause 2:

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

5. Amendment IX:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

6. Amendment X

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States

are reserved to the States, respectively, or to the people."

7. Article VI, Clause 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

8. Amendment XIV, Section 1:

"No State shall ... enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of ... liberty ... without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

9. Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting

the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

10. Amendment V:

"No person shall be ... deprived of ... liberty... without the due process of law; ... ."

11. Amendment XIII, Section 1:

"Neither ... nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

B. STATUTES

12. Annotated Laws of Massachusetts, Chapter 53, Section 44:

"The nomination of candidates for nomination at state primaries shall be by nomination papers. In the case of ... United States senator, nomination papers shall be signed in the aggregate by at least ten thousand voters.

13. Annotated Laws of Massachusetts, Chapter 53, Section 45:

> "A nomination paper shall be valid only in respect to a candidate whose written acceptance is thereon; ..."

14. Annotated Laws of Massachusetts, Chapter 53, Section 46:

> "Every nomination paper of a candidate for state office shall be submitted on or before five o'clock post meridian of the twenty-eighth day preceding the day on which it must be filed with the state secretary to the registrars of the city or town in which the signers appear to be voters... . Each nomination paper shall be marked with the date and time it was submitted and such papers shall be certified in order of submission. Said registrars shall check each name to be certified by them on the nomination paper and shall forthwith certify thereon the number of signatures so checked which are names of voters both in the city or town and in the district for which the nomination is made, and who are not enrolled in any other

party than that whose nomination the candidate seeks, and only names so checked shall be deemed to be names of qualified voters for the purpose of nomination. The registrars shall place next to each name not checked symbols indicating the reason that name was disqualified. The certification of voters shall be signed by a majority of the board of registrars."

15. Annotated Laws of Massachusetts, Chapter 53, Section 47:

"For the purpose of certifying the names on primary nomination papers the registrars shall hold meetings on the four Tuesdays next preceding the seventh day before the final day on which such papers are required to be filed with the state secretary."

16. Annotated Laws of Massachusetts, Chapter 53, Section 48:

"Certificates of nomination or nomination papers for the office of senator in congress ... shall be filed on or before the first Tuesday in June of the year in which a state

election is to be held ... The state secretary shall forthwith issue to the candidate or other person filing such nomination papers a certificate acknowledging the time and date of the receipt thereof.

"There shall not be printed on the ballot at the state primary the name of any person as a candidate for nomination for any office to be filled by all the voters of the commonwealth ... unless a certificate from the registrars of voters of the city or town wherein such person has been a registered voter for more than ninety days and that he has been enrolled as a member of the political party whose nomination he seeks on or before the ninetieth day prior to the last day herein provided for filing nomination papers with the state secretary is filed with the state secretary on or before such filing deadline. Said registrars shall issue such a certifi-

> cate, signed by a majority thereof, forthwith upon request of any such candidate so enrolled or of his authorized representative ... No such certificate shall be issued to any person who is a candidate for nomination for any such office, if such person has been an enrolled member of another political party during the year prior to the last day of filing nomination papers with the state secretary as provided by this section."

17. Annotated Laws of Massachusetts, Chapter 53, Section 2:

> "... candidates of political parties for all elective offices ... shall be nominated ... in primaries or caucuses ... ."

18. The Civil Rights Act of 1871, 42 USC 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other

persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

19. 28 USC 1652:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

20. Federal Election Campaign Act of 1971, as amended, the following sections:

a) 2 USC 431(1)A

"When used in this Act: (1) The term 'election means- (a) a general special primary, or runoff election;

b) 2 USC 431(1)B

"a convention or caucus of a political party which has authority to nominate a can-

didate;

c) 2 USC 431(2):

"The term 'candidate' means an individual who seeks nomination for election, or election, to Federal office and for purposes of this paragraph, an individual shall be deemed to seek nomination for election or election-

(A) if such individual has received contributions aggregating in excess of $5,000 or has made expenditures aggregating in excess of $5,000;

(B) if such individual has given his or her consent to another person to receive contributions or make expenditures on behalf of such individual and if such person has received such contributions aggregating in excess of $5,000 or has made such expenditures aggregating in excess of $5,000;

d) 2 USC 431(3):

"The term 'Federal office' means the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to the Congress;"

21. 42 USC 1971(b) and (c):

"Intimidation, threats or coercion. No person, whether acting under color of law or otherwise, shall ... coerce, or attempt to ... coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of... Member of the Senate, ... at any ... special or primary election."

"(c) Proceedings for preventive relief. Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order... . Whenever a proceeding instituted under

this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a), the act or practice shall also be deemed that of the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State.

22. 2 USC 431(3):

"Whenever a State ... with respect to which the prohibitions set forth in section 4(a) (42 USCS § 1973(a)) based upon determinations made under the first sentence of section 4(b) (42 USCS § 1973(b)) are in effect shall enact or seek to administer any ... standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State ... with respect to which the prohibitions set forth in section 4(a) (42 USCS § 1973(a))

based upon determinations made under the second sentence of section 4(b) (42 USCS § 1973b(b) are in effect shall enact or seek to administer any ... standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State ... with respect to which the prohibitions set forth in section 4(a) (42 USCS § 1973b(a)) based upon determinationa made under the third sentence of section 4(b) (42 USCS 1973b(b)) are in effect shall enact or seek to administer any ... standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State ... may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) (42 USCS § 1973b(f)(2))."